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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-9361

JOHN FRANKOVIGLIA,
Petitioner,

vs.

GEORGE CAMP and DONALD W. WYRICK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. .....

JOHN FRANKOVIGLIA,
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GEORGE CAMP and DONALD W. WYRICK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this cause on December 3, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, not yet reported, was entered on December 3, 1975. The opinion of the Court is shown in the appendix at page A1. In view of the Summary Discharge of the cause by the Appellate Court, no Petition for Rehearing or Rehearing In Banc was filed by this Petitioner.

The opinion of the United States District Court regarding this matter is reported at 394 F.Supp. 1293 (R.S.Mo.,

1975), and appears in the appendix at page A2. The opinion of the Missouri Supreme Court in this cause is reported at 514 S.W.2d 536 (Mo., 1974), and appears in the appendix at page A7. The opinion of the State Trial Court overruling Petitioner's Motion for New Trial is unreported, and appears in the appendix at page A17.

JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and 28 U.S.C. Section 2101.

QUESTION PRESENTED

1. Whether the opinion of the Court of Appeals conflicts with applicable decisions of this Court regarding a federal Constitutional question, more particularly, *Griffin* v. *Califor*[illegible] 380 U.S. 609 (1965), holding that the Prosecutor's comment during closing argument of Petitioner's trial for murder that "I think Mr. Frankoviglia is just beginning to realize what he is facing. I notice he didn't respond to testimony of the murder of Mr. Landie" did not violate Petitioner's right under the Fifth Amendment to the United States Constitution that no person shall be compelled to be a witness against himself.

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment V, provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

Procedural History

Appellant (hereinafter "defendant", "petitioner", or "Frankoviglia") was originally charged in the Circuit Court of Jackson County, Missouri with murder in the first degree (Tr. pp. 1-4).[1] Thereafter defendant's motion for change of venue was granted and the case transferred for trial to the Circuit Court of St. Louis County, Missouri (Tr. pp. 5-11).

Thereafter, trial was held in the Court of the Honorable James Ruddy, Circuit Judge, and on March 25, 1972 the jury returned a verdict of guilty with a sentence of life imprisonment (Tr. p. 628). On May 25, 1972, Judge Ruddy imposed the life sentence upon defendant (Tr. pp. 643-644) and thereafter defendant appealed to the Supreme Court of Missouri. The Supreme Court affirmed defendant's conviction on September 9, 1974 and the opinion of said Court is reported at 514 S.W.2d 536 (Mo., 1974). Thereafter, defendant filed on November 11, 1974 a Petition for Habeas Corpus with the United States District Court for the Western District of Missouri. The cause was subsequently transferred to the United States District Court for the Eastern District of Missouri pursuant to the provisions of 28 U.S.C., Section 2241(d).

Thereafter, Judge Regan denied on the merits the Petition on April 24, 1975. A Certificate of Probable Cause was issued by Judge Regan on May 19, 1975.

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1. The transcript of the trial of defendant is a part of the Record in this cause and hereinafter will be referred to as Tr. p. .....

Thereafter, Petitioner appealed and Judge Regan's Order was affirmed by the Eighth Circuit on December 3, 1975.

As to the facts, the appellant submits the following as a statement concerning the trial of the matter.

Facts

A. INTRODUCTION.

In the early morning hours of Sunday, November 22, 1970, in a southern residential district of Kansas City, Missouri, a junkyard dealer by the name of Sol Landie was murdered in his bed as his wife lay beside him. Landie's wife was raped and his home was ransacked. The fact that Landie was killed, his wife raped, and his home ransacked was not disputed by appellant. (See the testimony concerning the physical facts and the real evidence of the murder as follows: (a) testimony of Ann Landie, wife of the deceased (Tr. pp. 134-148); (b) testimony of Dr. David Zollar, Pathologist (Tr. pp. 75-82); (c) testimony of Detective George Henthorn, Kansas City, Missouri Police Department, who recovered the bullet from the Pathologist (Tr. pp. 148-150); (d) testimony of Sergeant Robert Hardesty, Kansas City, Missouri Police Department, who identified the firearm involved in the murder (Tr. pp. 150-156); and (e) the testimony of Captain Fred McDaniel, Kansas City, Missouri Police Department, who investigated the scene of the crime, took photographs, and prepared a diagram (Tr. pp. 160-185).)

Appellant was charged with Murder in the First Degree (Tr. pp. 1-4) in connection with the slaying. Prior to trial, appellant's Motion for Change of Venue was granted and the case was transferred for trial to the Circuit Court of St. Louis County, Missouri (Tr. pp. 5-11).

B. THE STATE'S CASE IN CHIEF.

The State's evidence was designed to show that appellant had contracted for the murder of Sol Landie, who was a witness in a Federal Prosecution.

The key witness for the State was Edward Ronald Williams (hereinafter referred to as "Ronnie"), who testified that, prior to the murder, he had a conversation with a Tommy Lee on November 9, 1970; that on November 13, 1970, Lee told Ronnie he wanted Sol Landie bumped off (Edward Medina, among others, saw Ronnie talking to Lee); that subsequently, Tommy Lee drove Ronnie in Lee's Cadillac to Landie's place of business and pointed out Landie to Ronnie (Tr. pp. 59-63). Ronnie testified that later, on the evening of November 21, 1970, he received a call from John Frankoviglia (hereinafter referred to as "Franks"), appellant, and was told to come to Franks's place of business (Tr. p. 51). Ronnie was asked by Franks why he had not killed Landie and was given some marijuana to build up his nerve (Tr. p. 51). Thereafter, Ronnie picked up Linda Holomon, went to a party, and then, in the company of Marquise Williams, a cousin of Ronnie's and a Gary Johnson, he went to a crap game with some lady friends and drank cognac, beer and wine, as did Gary Johnson and Marquise Williams (Tr. pp. 52-53). They smoked marijuana until about 1:30 in the morning. The three returned to Ronnie Williams's home and there continued partying (Tr. p. 54). Franks called Ronnie at his home and told him that, if the job was not performed, a bomb would be put under his house or he would be bumped off (Tr. p. 54). Ronnie stated that thereafter he, Marquise Williams and Gary Johnson went to Sol Landie's house (defendant had given them the address and told them the door would be open, and told them to make it look like a robbery), went in the back door, said he heard a shot in

the bedroom, that Landie got killed, that he didn't pull the trigger (Tr. pp. 56-58).

The next morning, November 23, 1970, Ronnie went to Franks's place of business and was told Tommy Lee had the money for him. Lee thereafter gave Ronnie $2,000.00 (Tr. pp. 70-71) and later Ronnie gave $300.00 to Marquise Williams, $300.00 to Gary Johnson and $1,000.00 to Earl Howard for throwing some of the proceeds of the robbery away, and kept $300.00 for himself (Tr. p. 71). On the Monday after the killing, Ronnie saw Franks and Lee at his house (Tr. p. 72). On Tuesday, November 24, 1970, Ronnie was arrested for the murder (Tr. p. 72). Lee told Ronnie that the reason Landie was to be killed was that Landie was behind some gambling indictments "or he was a witness." (Tr. p. 64).

Other witnesses were presented by the State to corroborate the State's chief witness. Richard Landie, nephew of the deceased, testified that on the day before Landie's death, he observed a dark blue Cadillac parked near the Landie junkyard (Tr. p. 190); that he spoke with two (2) Negro males in the office of Landie's junkyard; that later he saw the car at the Kansas City Police Department lot after the murder (Tr. pp. 191-192); that he later picked Lee out of a lineup and identified him as the man he spoke with at the Landie junkyard the day before the crime (Tr. pp. 192-193).

Glenda Mae Williams, sister of Ronnie Williams, testified that she had known Tommy Lee for some time; that she knew Lee's voice; that during the week prior to Landie's death, Lee would call three or four times a day; that on the day after the murder, Tommy Lee came by and picked Ronnie up in his car; that someone else was in the car but she could not recognize who it was (Tr. pp. 200-203).

William Green, a fingerprint technician with the Kansas City, Missouri Police Department, testified that certain fingerprints of Gary Johnson were found at the scene of the crime (Tr. pp. 221-236).

Linda Holomon testified she was acquainted with Ronnie Williams and Marquise; that on Saturday, November 21, 1970, she went to a party with Ronnie and Marquise Williams and Gary Johnson; that later the above persons and Earl Howard and his wife went back to Ronnie's house and partied some more; that later on Ronnie, Mark, Gary and Earl left the house and came back approximately an hour and a half later (Tr. pp. 242-247).

Marquise Williams (hereinafter referred to as "Mark") also testified for the State. He stated he was a cousin of Ronnie Williams; that he shot and killed Landie in the company of Ronnie Williams and Gary Johnson (Tr. pp. 265-266). Prior to the crime, Ronnie, Gary Johnson and Mark went to Franks's place of business; that only Ronnie went inside, while Johnson and Mark waited at a cafe. Later on, the three returned to Franks's place of business and again only Ronnie went inside. The threesome left again, went to a party, shot crap, smoked marijuana, drank, went to a liquor store, went back to Ronnie's house, drank and smoked more marijuana with Ronnie, Johnson, Earl Howard and his wife (Tr. pp. 272-279).

Mark testified further that, some time during the evening before the murder, Franks called and that he, Ronnie and Gary then proceeded to Landie's home, forced open the kitchen door and entered the Landie home. There, Mark entered the bedroom, had Mrs. Landie put a pillow over her face and Ronnie and Johnson started "tearing up the house." (Tr. pp. 280-281). Mark then shot Landie through the head twice through a pillow and the threesome returned home (Tr. p. 282). Later on, Ronnie gave Mark

$300.00 for his part in the crime (Tr. p. 285). Mark also testified to some offers and threats from Lee and Frankoviglia (Tr. pp. 285-292).

Calvin Hamilton was First Assistant United States Attorney in Kansas City, Missouri in November, 1970. He testified that Sol Landie was a witness before a Federal Grand Jury; that Indictments were returned; that, if Landie had lived, he would have been a key Government witness at the trial of the case (Tr. pp. 317-325).

Edward Medina testified that, on November 13, 1970, he was in a car with Earl Howard, Howard Hill and Ronnie Williams; that Earl Howard stopped his car because Ronnie wanted to talk with Tommy Lee and did so, but that he heard none of the conversation (Tr. pp. 419-421). After the murder, at the home of Orville Haack, Medina saw Howard Hill and Earl Howard examining some credit cards bearing the name of Sol Landie (Tr. pp. 421-422).

Detective Clarence Luther of the Kansas City Police Department testified that Gary Johnson was arrested on November 25, 1970; that Ronnie and Mark Williams were arrested on or about this date; that Tommy Lee was arrested on November 25, 1970; that when Earl Howard was arrested his home was searched and items from the Landie home were found (Tr. pp. 430-435).

Detective Bert Cool of the Kansas City, Missouri Police Department testified that he arrested Franks on November 26, 1970, as he proceeded out of the City in the company of a woman and two (2) children; and that he arrested Tommy Lee on November 25, 1970 (Tr. pp. 440-443). He further testified that on the morning of his testimony at trial he took pictures of the defendant's car and that it was the same car defendant was driving when arrested on November 26, 1970 (Tr. pp. 444-445).

Gary Johnson (hereinafter referred to as "Johnson") was the State's final witness. He testified that, on the Wednesday preceding the murder of Landie, Ronnie told Mark and him, that a "Dago" wanted a job done (Tr. p. 454). On the Friday preceding the murder, Ronnie, he and Mark went to Franks's place of business, Mark and Johnson being left off at a cafe (Tr. pp. 455-456). Later on that same day, Tommy Lee and Franks came by Ronnie's house and Ronnie talked with them. Ronnie told Mark and Johnson that Franks wanted the job done Saturday or Sunday, and that the man to be killed owned a junkyard and lived at "70 something Washington" (Tr. pp. 457-459). The next day (Saturday) Ronnie, Mark and Johnson went to the junkyard to see Landie but didn't see him (Tr. p. 460). Later on Saturday, Ronnie, Mark and Gary went to Franks's place, Ronnie went in and came back out with three (3) sticks of marijuana and something bearing the address of Sol Landie. Franks's car—a maroon Cadillac—was there (Tr. pp. 460-461). After leaving Franks's place, he went to a crap game, smoked marijuana, left the crap game and went to a liquor store and went to Ronnie's house and drank wine and beer. All this was accomplished in the company of Ronnie, Mark, Earl Howard and his wife, Linda Holomon, "Yvette", and "this other girl." (Tr. pp. 461-463). Thereafter, Mark, Ronnie, Earl Howard and Johnson went to Landie's house, but returned to Ronnie's place; left again and went back to Landie's home. There, in the bedroom, were Landie and his wife and Johnson and Ronnie proceeded to "get on top of" Mrs. Landie. Johnson carried out some jewelry as did Ronnie and Earl Howard. Johnson received approximately $200.00 from Mark for the job (Tr. pp. 464-465). Johnson said Franks threatened him in jail (Tr. p. 472) and that an attorney for Howard told him if he didn't sign a statement exonerating Earl Howard, Howard could get the death penalty (Tr. pp. 472-473).

The State then rested its case (Tr. p. 508) and Defendant's Motion for Acquittal was overruled by the Court (Tr. pp. 508-509).

C. CROSS-EXAMINATION OF STATE'S WITNESSES.

Cross-examination of the State's witnesses revealed inconsistencies and contradictions in their testimony reflecting on their credibility.

Ronnie Williams testified he had plead guilty to the murder of Landie and had received a life sentence (Tr. p. 47). Prior to this crime, he had been convicted twice of carrying a concealed weapon and of assault (Tr. pp. 128-129). On the day of the murder, he had been drinking all day (Tr. p. 84) and smoked more than one marijuana cigarette (Tr. p. 85). On direct examination, he testified there were only three persons who committed the crime—he, Johnson and Mark. However, Ronnie admitted making a statement to the Police immediately after the crime; the statement contained a statement that four (4) individuals were at the scene of the crime (Tr. pp. 86-88). Later, he testified at a bond hearing that four (4) persons went to the scene of the crime (Tr. p. 89).

On direct examination, Ronnie testified that $2,000.00 was given as payment for the contract to kill Landie. However, in Ronnie's original statement to the police, he testified he had only received $1,000.00 (Tr. p. 91). At the bail hearing, he also testified he only received $1,000.00 (Tr. pp. 92-95) and admitted he had lied under oath (Tr. p. 95). Ronnie denied on cross-examination that he had raped or gotten on top of Mrs. Landie (Tr. p. 103) but admitted that he had under oath testified in a companion case (Howard's) that he had in fact gotten on top of Mrs.

Landie (Tr. pp. 104-105). In the statement he admittedly signed just after the arrest, he admitted having intercourse with Mrs. Landie (Tr. pp. 106-107). Ronnie denied when asked whether he had told his two confederates that they were going to do a burglary or a robbery but admitted stating in a deposition that he told the two confederates they were going to commit a burglary or robbery (Tr. pp. 109-111). When asked, Ronnie denied seeing or hearing Landie shot and didn't know he was dead until the next morning, but admitted that during a deposition he stated under oath he had heard two (2) shots (Tr. pp. 112-116).

Ronnie, finally, admitted giving a statement under oath in which he stated that Franks was not involved in the murder of Sol Landie and that prior statements were untrue (Tr. p. 120). Ronnie admitted he was testifying because he would "rather have life than death." (Tr. p. 134). (Ronnie had also testified he and Tommy Lee had gone over to see Sol Landie at his junkyard. Richard Landie testified he had identified only Tommy Lee and Earl Howard as being at the junkyard (Tr. p. 196).)

(Ann Landie, wife of the deceased, testified that four (4) men entered her home, who told her "this is a holdup" (Tr. pp. 137-138), and was raped twice and hit in the face with a gun (Tr. p. 139). Her home was ransacked and she suffered a loss of over $10,000.00 (Tr. pp. 141, 142 147) and one of the intruders had placed a pistol into her private parts (Tr. p. 147).)

Ronnie testified on direct that it was on the afternoon—Saturday—before the murder that he went to Franks's place in his own car. Glenda Williams, Ronnie's sister testified, however, that Ronnie left with Tommy Lee on that Saturday afternoon (Tr. p. 205).

Glenda Williams testified on direct examination that on November 23, 1970, in the evening, Tommy Lee came by her house in his Cadillac and that someone else was in the car with Tommy, and that Ronnie left with them (Tr. pp. 202-203). On cross-examination she admitted making a statement under oath at a previous trial that she did not see Ronnie get into any car, did not see any Cadillac waiting and did not see Ronnie leave in a car; that later on she saw a Cadillac at her house but couldn't see into the car interior and didn't know who was in it (Tr. pp. 216-219).

Mark Williams, on cross-examination, testified no one had helped him hold the pillow over Mr. Landie's head or pull the trigger (Tr. p. 297). Mark said he was the one who had the pistol in the house but denied sticking the barrel of the gun into the private parts of Mrs. Landie (Tr. p. 307). He denied Earl Howard was there at the murder (Tr. p. 307). He didn't see Mrs. Landie being raped and he didn't do it (Tr. p. 307). He stated he made only one trip to the Landie home (Tr. p. 310). He admitted making a statement to a Court Reporter that Franks was not involved in the murder of Sol Landie (Tr. p. 313). He admitted lying to the Police about whether Gary Johnson held the pillow over Landie's head (Tr. p. 315). (The statement Mark acknowledged signing stated that Gary Johnson had held the pillow (Tr. p. 346), and that "Ain't you supposed to lie to them?", and that "I was trying to save my own neck, understand." (Tr. p. 346).) Mark admitted lying about a number of other matters (Tr. pp. 348-349). He admitted telling the police that he didn't know Landie was a government witness until he was arrested for the crime (Tr. pp. 352-357), which was contrary to testimony on direct examination (Tr. p. 350). Mark was asked again whether he knew Mrs. Lan-

die had been raped and he answered, "she could not be raped, not that I know of." (Tr. p. 357). However, he admitted that he had stated under oath in a previous trial that Ronnie had told him he had raped Mrs. Landie (Tr. pp. 358-359). He admitted stating on direct examination that he had been threatened to give a statement to Mr. McMullin but also admitted the statement to McMullin contained a statement that he had not been threatened (Tr. p. 368). He stated no promises had been made by the Prosecutor to get him to testify but admitted making a statement that promises had been made (Tr. pp. 369-371). Mark admitted making a statement that Franks had no part in the killing of Landie (Tr. pp. 370-371).

Gary Johnson admitted that, just after his arrest, he gave a statement to the police in the presence of his grandmother, mother and lawyer in which he stated that he, Ronnie, Mark and Earl Howard had discussed "burglarizing" the house of Landie. They then went inside the house and there Ronnie raped the woman and Earl was holding the gun (Tr. p. 377); that he knew nothing of the shooting until he heard it on the news broadcast (Tr. p. 478). As to how the four knew the Landie house, he responded: "Earl said there was a house that had a lot of stuff in it and Earl gave the directions on how to get to this house. I have read this statement and it is true according to my best knowledge and belief." (Tr. p. 379). He admitted that the police had returned two days later and asked him to change his statement (Tr. p. 480). Johnson stated, when asked, that he hadn't raped Mrs. Landie (Tr. p. 483), but admitted telling the police in his second statement that he had "raped her" (Tr. p. 484). When asked he denied that he had held the pillow over Landie when Mark shot him, but admitted he gave a statement to the police in which he said he had held the pillow (Tr.

p. 487). When asked, he denied having his penis out when atop Mrs. Landie but admitted that he may have said he did at a previous trial (Tr. pp. 490-491).

Johnson further admitted making a statement that only he, Ronnie and Mark went to the Landie home; that the three went there only to rob the Landies (Tr. pp. 491-493). He admitted his lawyer had told him that if he pled guilty to the murder the least he could get would be a life sentence (Tr. p. 502).

D. DEFENDANT'S CASE IN CHIEF.

James McMullin was the first witness for the defendant. He was the law partner of trial counsel (Tr. p. 519) and also trial counsel himself for Earl Howard and Tommy Lee (Tr. p. 511). He testified that he took a handwritten statement from Gary Johnson on November 5, 1971; that Johnson did not complain of being threatened by anyone; that two deputy sheriffs were about five (5) feet away when the statement was taken (Tr. p. 512). McMullin also interviewed Ronnie and Marquise Williams in the County Jail in Kansas City, Missouri, and that the statements by them exonerating Franks were given under oath (Tr. pp. 513-516).

Ralph Barreco also testified for the defendant. He stated that he was the brother-in-law of defendant; that he worked on Saturdays at Franks's place of business; that Franks did not work at his business on Saturdays; that Franks did not work at his place of business on any Saturday during November, 1970.

Nicholas and Angelina Frankoviglia also testified for the defendant. They testified they were the children of defendant; that on Saturday, November 21, 1970, their father was home with them; that, in the evening, defen-

dant, his wife and his children went to the Sizzler Steakhouse and returned home about ten in the evening and went to bed (Tr. pp. 554-565). Defendant rested. Neither defendant nor his wife elected to testify. The Jurors were duly instructed.

E. CLOSING ARGUMENT.

During closing argument, State's counsel referred to the failure of defendant's wife to testify (Tr. p. 585). Objection was made and a mistrial requested. The Court sustained the objection, instructed the jury to disregard it, but denied the request for mistrial (Tr. pp. 585-586).

Also, during closing argument, State's counsel referred to the failure of defendant himself to testify (Tr. p. 622). Objection was made. The Court overruled the objection but cautioned the State's counsel "to stay clear of that subject matter. You are getting dangerously close to it" (Tr. p. 622).

F. CONCLUSION.

The verdict of guilty with a sentence of life imprisonment was returned by the jury on March 25, 197[illegible] (Tr. p. 628). The Court overruled Defendant's Motion for Acquittal or New Trial on May 18, 1972 (Tr. pp. 641-642) and sentenced defendant to life imprisonment on May 25, 1972 (Tr. pp. 643-644). Thereafter, appeals as noted above followed.

REASON FOR GRANTING THE WRIT

The Decision Below Conflicts With Applicable Decisions of This Court Because the Prosecutor's Comment in Closing Argument That, "I Think Mr. Frankoviglia Is Just Beginning to Realize What He Is Facing. I Notice He Didn't Respond to Testimony of the Murder of Mr. Landie," Constituted a Violation of Defendant's Privilege Against Self-Incrimination As Guaranteed by the Fifth Amendment to the U. S. Constitution Which Provides That No Person Shall Be Compelled to Be a Witness Against Himself, and Said Comment Called the Jury's Attention to the Defendant's Failure to Testify. Since There Was a Reasonable Possibility That the Comment Contributed to the Conviction of Defendant, the Error Cannot Be Called Harmless and Defendant Is Entitled to a Reversal of His Conviction.

During the closing argument, Joseph Teasdale, Prosecuting Attorney of Jackson County, stated:

> "I think Mr. Frankoviglia is just beginning to realize what he is facing. I notice he didn't respond to testimony of the murder of Mr. Landie." (Tr. pp. 621-622).

Counsel for defendant (at the Bench and out of the hearing of the jury) immediately made the following objection:

> "MR. HILL: We object to the Prosecutor's statement as being a comment on the failure of the defendant to take the stand.
>
> MR. TEASDALE: I am obviously referring to his breaking down and weeping during the final argument.

> THE COURT: I overrule the objection, but I caution you to stay clear of that subject matter. You are getting dangerously close to it.
>
> (The above concluded the proceedings had out of the hearing of the jury.)"

The Constitution of the United States in the Fifth Amendment thereto, does provide, *inter alia*: "No person . . . shall be compelled in any criminal case to be a witness against himself . . .", U. S. Const., Amend. V. The privilege against self-incrimination has been absorbed into the due process clause of the Fourteenth Amendment to the United States Constitution and thus made applicable to the States. *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Griffin* v. *California*, 380 U.S. 609 (1965); *Tehon* v. *United States ex rel. Shott*, 382 U.S. 406 (1966).

In *Stewart* v. *United States*, 366 U.S. 1 (1961), comment about a defendant's failure to take the stand was prohibited. The standard involving the Fifth Amendment Privilege of a defendant in Federal Court was a Federal standard adopted by the Supreme Court for the States in *Malloy* v. *Hogan*, cited *supra*. See *Griffin* v. *California*, cited *supra*, at page 615.[2]

Of course, the Constitution of the State of Missouri, Article I, Section 19 (1945), provides:

> "That no person shall be compelled to testify against himself in a criminal cause." (Constitution of 1945 (annotated, p. 728).)

There are a number of recent federal cases discussing comments of a prosecuting attorney on the defendant's Fifth Amendment privilege against self-incrimination. In

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2. See also Rule 26.08, Missouri Rules of Criminal Procedure.

the landmark decision of *Griffin* v. *California, supra* at 615, the United States Supreme Court reversed the Petitioner's conviction and held ". . . that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt." See also Annot., 24 ALR 3d 1093 (1969).

In *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Supreme Court held that all trial errors of constitutional dimension do not automatically call for reversal, but the Court concluded that if there is a reasonable possibility that the error might have contributed to the conviction it could not be called harmless. See *Fahy* v. *Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963). *Chapman* placed the burden squarely on the prosecution to prove beyond a reasonable doubt the harmlessness of such a federal constitutional error.

The *Chapman* concept has been modified and refined by adding a three-pronged test by which harmless error could be determined. This test, which has been construed to contain minimal constitutional standards binding on the States, may be broken down as follows:

1. Is the comment extensive?

2. Is the defendant's silence stressed to the jury as a basis of conviction?

3. Is there evidence that could have supported acquittal?

Anderson v. *Nelson*, 390 U.S. 523, 88 S.Ct. 1133, 20 L.Ed.2d 81 (1968).

Shortly after the *Anderson* decision, the United States Supreme Court ruled that when a state jury is asked to convict a defendant on circumstantial evidence, and a constitutionally impermissible comment is made in argument, such comment cannot be considered harmless unless it is shown beyond a reasonable doubt that it did not contribute to the resultant conviction. *Fontaine* v. *California*, 390 U.S. 593, 88 S.Ct. 1229, 20 L.Ed.2d 154 (1968). See also, *Pope* v. *Harper*, 407 F.2d 1303 (9th Cir., 1969).

In light of the above general rules and concepts, an analysis of the gravity and impact of the error is guided by two general precepts. First, ". . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California*, *supra* at 24. See *Harrington* v. *California*, 395 U.S. 250, 251, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); *Schneble* v. *Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972). This reasonable doubt standard reflects a fundamental belief that upon establishment of constitutional error, it is far worse to conclude incorrectly that the error was harmless than it is to conclude incorrectly that the error was reversible. *Commonwealth* v. *Davis*, 452 Pa. 171, 305 A.2d 715 (1973). *Cf. In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *U. S.* v. *Hale*, 95 S.Ct. 2133 (1975).

The second general precept which is applied in determining whether a particular constitutional error was harmless is that the burden is on the State to establish that the error was harmless. *Chapman* v. *California*, *supra* at 24, 26; *Fontaine* v. *California*, *supra* at 596. The general rule of placing the burden on the State follows "the original common-law harmless-error rule (that) put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained

judgment." *Chapman* v. *California, supra* at 24 (citing 1 Wigmore, Evidence, Section 21 (3d ed. 1940)). Furthermore, it should be noted that federal standards govern what constitutional error must be considered prejudicial. *Chapman* v. *California, supra* at 20-23.

Keeping these precepts in mind, the question becomes whether "there is a reasonable possibility" that the constitutional error "might have contributed to the conviction." *Chapman* v. *California, supra* at 24. As demonstrated by the following evidence established during the trial, such a possibility existed and there certainly was a reasonable doubt in this case, especially since another defendant was acquitted on the same testimony as convicted petitioner.

The State's evidence revealed material inconsistencies, contradictions and outright perjury. It can be said that it rested on the testimony of Ronnie Williams—without his testimony there is no direct evidence of Franks's involvement. The testimony of Johnson and Mark Williams rests upon that of Ronnie Williams (see testimony of Mark Williams (Tr. pp. 305-306), and that of Gary Johnson (Tr. pp. 454-458, 460), and without Ronnie Williams's testimony no conspiracy (permitting hearsay statements)) could have been established and a submissible case against John Frankoviglia would never have been established. Ronnie Williams's testimony is that of an accomplice who testified to save his own life. His testimony is replete with contradictions, inconsistencies and perjury.

Ronnie Williams testified he had pled guilty to the murder of Landie and had received a life sentence (Tr. p. 47). Prior to this crime, he had been convicted twice of carrying a concealed weapon and of assault (Tr. pp. 128-129). On the day of the murder, he had been drinking all day (Tr. p. 84) and smoked more than one marijuana cigarette (Tr. p. 85). On direct examination, he testified

there were only three persons who committed the crime—he, Johnson and Mark. However, Ronnie admitted making a statement to the Police immediately after the crime; the statement contained a statement that four (4) individuals were at the scene of the crime (Tr. pp. 86-88). Later, he testified at a bond hearing that four (4) persons went to the scene of the crime (Tr. p. 89).

On direct examination, Ronnie testified that $2,000.00 was given as payment for the contract to kill Landie. However, in Ronnie's original statement to the police, he testified he had only received $1,000.00 (Tr. p. 91). At the bail hearing, he also testified he only received $1,000.00 (Tr. pp. 92-95) and admitted he had lied under oath (Tr. p. 95). Ronnie denied on cross-examination that he had raped or gotten on top of Mrs. Landie (Tr. p. 103) but admitted that he had under oath testified in a companion case that he had in fact gotten on top of Mrs. Landie (Tr. pp. 104-105). In the statement he admittedly signed just after the arrest, he admitted having intercourse with Mrs. Landie (Tr. pp. 106-107). Ronnie denied when asked whether he had told his two confederates that they were going to do a burglary or a robbery but admitted stating in a deposition that he told the two confederates they were going to commit a burglary or robbery (Tr. pp. 109-111). When asked, Ronnie denied seeing or hearing Landie shot and didn't know he was dead until the next morning, but admitted that during a deposition he stated under oath he had heard two (2) shots (Tr. pp. 112-116).

Ronnie, finally, admitted giving a statement under oath in which he stated that Franks was not involved in the murder of Sol Landie and prior statements were untrue (Tr. p. 120). Ronnie admitted he was testifying because he would "rather have life than death." (Tr. p. 134). (Ronnie had also testified he and Tommy Lee had gone over to

see Sol Landie at his junkyard. Richard Landie testified he had identified only Tommy Lee and Earl Howard as being at the junkyard (Tr. p. 196).)

(Ann Landie, wife of the deceased, testified that four (4) men entered her home, who told her "this is a holdup" (Tr. pp. 137-138), and was raped twice and hit in the face with a gun (Tr. p. 139). Her home was robbed and she suffered a loss of over $10,000.00 (Tr. pp. 141, 142, 147) and one of the intruders had placed a pistol into her private parts (Tr. p. 147).)

(Ronnie testified on direct that it was on the afternoon —Saturday— before the murder that he went to Franks's place in his own car. Glenda Williams, Ronnie's sister, testified, however, that Ronnie left with Tommy Lee on that Saturday afternoon (Tr. p. 205).)

Glenda Williams testified on direct examination that on November 23, 1970, in the evening, Tommy Lee came by her house in his Cadillac and that someone else was in the car with Tommy, and that Ronnie left with them (Tr. pp. 202-203). On cross-examination she admitted making a statement at a previous trial that she did not see Ronnie leave in a car; that she couldn't see into the car interior and didn't know who was in it (Tr. pp. 217-219).

Mark Williams, on cross-examination, testified no one had helped him hold the pillow over Mr. Landie's head or pull the trigger (Tr. p. 297). Mark said he was the one who had the pistol in the house but denied sticking the barrel of the gun into the private parts of Mrs. Landie (Tr. p. 307). He didn't see Mrs. Landie being raped and he didn't do it (Tr. p. 307). He stated he made only one trip to the Landie home (Tr. p. 310). He admitted making a statement to a Court Reporter that Franks was not involved in the murder of Sol Landie (Tr. p. 313). He admitted

lying to the Police about whether Gary Johnson held the pillow over Landie's head (Tr. p. 315). (The statement Mark acknowledged signing stated that Gary Johnson had held the pillow (Tr. p. 346), and that "Ain't you supposed to lie to them?", and that "I was trying to save my own neck, understand." (Tr. p. 346).) Mark admitted lying about a number of other matters (Tr. pp. 348-349). He admitted telling the Police that he didn't know Landie was a government witness until he was arrested for the crime (Tr. pp. 352-357), which was contrary to testimony on direct examination (Tr. p. 350). Mark was asked again whether he knew Mrs. Landie had been raped and he answered, "she could not be raped, not that I know of." (Tr. p. 357). However, he admitted that he had stated under oath in a previous trial that Ronnie had told him he had raped Mrs. Landie (Tr. pp. 358-359). He admitted stating on direct examination that he had been threatened to give a statement to Mr. McMullin but also admitted the statement to McMullin contained a statement that he had not been threatened (Tr. p. 368). He stated no promises had been made by the prosecutor to get him to testify but admitted making a statement that promises had been made (Tr. pp. 369-371). Mark admitted making a statement that Franks had no part in the killing of Landie (Tr. pp. 370-371).

Gary Johnson admitted that, just after his arrest, he gave a statement to the police in the presence of his grandmother, mother and lawyer in which he stated that he, Ronnie, Mark and Earl Howard had discussed "burglarizing" the house of Landie. They then went inside the house and there Ronnie raped the woman and Earl was holding the gun (Tr. p. 377); that he knew nothing of the shooting until he heard it on the news broadcast (Tr. p. 478). As to how the four knew the Landie house, he responded: "Earl

said there was a house that had a lot of stuff in it and Earl gave the directions on how to get to this house. I have read this statement and it is true according to my best knowledge and belief." (Tr. p. 379). He admitted that the police had returned two days later and asked him to change his statement (Tr. p. 480). Johnson stated, when asked, that he hadn't raped Mrs. Landie (Tr. p. 483), but admitted telling the police in his second statement that he had "raped her" (Tr. p. 484). When asked he denied that he had held the pillow over Landie when Mark shot him, but admitted he gave a statement to the police in which he said he had held the pillow (Tr. p. 487). When asked, he denied having his penis out when atop Mrs. Landie but admitted that he may have said he did at a previous trial (Tr. pp. 490-491).

Johnson further admitted making a statement that only he, Ronnie and Mark went to the Landie home; that the three went there only to rob the Landies (Tr. pp. 491-493). He admitted his lawyer had told him that if he pled guilty to the murder the least he could get would be a life sentence (Tr. p. 502).

The testimony of three accomplices—admitted murderers, robbers and rapists—who perjure themselves—should not form the basis for a conviction against the appellant. 23 C.J.S., Section 905.

Moreover, Earl Howard (co-defendant) was acquitted in this cause upon the same testimony rendered at appellant's trial (Tr. pp. 538-540). In *People* v. *Herson,* 8 N.Y.S. 2d 887 (Sup. Ct. App. Div., 1939), it was held that testimony which was not believed as respects one defendant who was acquitted cannot be used to convict another defendant (at p. 890). (Case was reversed on other grounds, 21 N.E.2d 498.)

The basic test for determining whether a statement before the jury by the prosecuting attorney was an improper comment upon a defendant's failure to testify has been defined as "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." See, *e.g., United States* v. *Williams,* 503 F.2d 480, 485 (8th Cir., 1974); *United States* v. *Mahana,* 461 F.2d 1110 (8th Cir., 1972); *United States ex rel. D'Ambrosio* v. *Fay,* 349 F.2d 957 (2nd Cir., 1965); *United States* v. *Wilson,* 500 F.2d 715 (5th Cir., 1974).

The remark being attacked here by the petitioner meets this test. Consideration thereof within the context of the entire record clearly displays a manifest intent by the prosecutor to draw the attention of the jury to the failure of the petitioner to testify and, at the very least, the jury would have considered the comment an oblique reference to the petitioner's silence. *Cf., United States* v. *Wertz,* 447 F.2d 451 (9th Cir., 1971). In *United States* v. *Driscoll,* 454 F.2d 792, 800 (5th Cir., 1972), the court stated "that oblique comments on a defendant's failure to testify, if sufficiently suggestive, are as unlawful as direct comments." Citing *Carlin* v. *United States,* 351 F.2d 618 (5th Cir., 1965); *Benham* v. *United States,* 215 F.2d 472 (5th Cir., 1954). Such comments by the prosecutor that even *indirectly* invites the jury's attention to the failure of the petitioner to take the stand during trial have been disapproved by the courts. *United States* v. *Hill,* 508 F.2d 345 (5th Cir., 1975). The prosecuting attorney's remarks here went beyond a permissive comment, and it is apparent that such remarks were extremely prejudicial and suggestive of the petitioner's failure to take the stand. See *Doty* v. *United States,* 416 F.2d 887 (10th Cir., 1968).

In *United States* v. *Handman*, 447 F.2d 853 (7th Cir., 1971), the court held that the government's argument was prejudicial error and stated at 855:

> "It is of no aid to the government that the reference here is less direct than in the *Chapman* argument, or argument in other cases. Prejudicial argument is not confined to instances where the government states explicitly 'one way or the other about the defendant not testifying' as in the argument in Rodriguez-Sandoval v. United States, 409 F.2d 529, 530 (1st Cir., 1969) or in Chapman v. California, 386 U.S. at 27, 87 S.Ct. 824. Neither is prejudice limited to instances where precise or certain words or phrases are used. If what was said in argument could reasonably be taken as comment upon Handman's right not to testify and thus used to support Solomon's credibility, the argument is improper. *Rodriguez-Sandoval*, 409 F.2d at 531. We think the argument before us could reasonably have had that effect upon the jury."

Assuming *arguendo* that the statement made by the prosecutor in closing argument is not a direct comment on the petitioner's failure to take the stand, even though petitioner feels strongly that it was a direct comment, the above cited cases and material demonstrate that even oblique and indirect comments are not allowed.

As the First Circuit recently stated in *United States* v. *Flannery*, 451 F.2d 880, 881 (1st Cir., 1971):

> "(W)e (have) held that for the government to say, in summation to the jury, that certain of its evidence was 'uncontradicted,' when contradiction would have required the defendant to take the stand, drew attention to his failure to do so, and hence was unconstitutional comment. Desmond v. United States, 1 Cir., 1965, 345 F.2d 225. We do not adopt the reason-

ing of those courts which state, it seems to us, ingenuously, that to say that the government witnesses' testimony was uncontradicted is simply a statement of historical fact. There are many 'facts' which are benign in themselves. The difficulty is that such reference, when only the defendant could have contradicted, clearly calls to the jury's mind the fact that he failed to testify." (Footnotes omitted).

The Court's attention is respectfully directed to the Opinion of the Supreme Court of Maine, *State* v. *Tibbits*, 299 A.2d 883 (Maine, 1973). In *Tibbits*, the Prosecutor made a comment upon the defendant's failure to testify. The Court concluded that precedent and the Maine Statute, as well as the Maine and United States Constitutions, prohibit either direct or equivocal prosecutorial comment on the defendant's failure to testify. Furthermore, the Court formulated the following standards under the Fifth Amendment by way of the Fourteenth Amendment:

"Impermissible prosecutorial comment can never be deemed harmless error as a matter of law under either of two circumstances:

1. A direct, non-ambiguous and unequivocal prosecutorial comment on the failure of a criminal defendant to become a witness.

2. An indirect prosecutorial comment which, without equivocation or ambiguity, suggests that a jury must accept as true the State's evidence because it is undenied by a criminal defendant as a witness. 5"[3]

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3. (Footnote 5) "We have not included the words 'extensive' or 'stressed', as suggested in *Anderson*, since we prefer to assume that either a direct comment or an unambiguous indirect comment should be thus construed. It is the import of the comment, not the number of words used, nor the emphasis with which they are spoken, that is determinative. The trial judge is thus relieved from making a subjective judgment of the impact of such comment on the minds of the jury."

In the opening portion of the State's closing argument, a statement was made referring to the failure of the petitioner's spouse to take the stand for the purposes of testifying, in violation of Rule 26.08 of the Missouri Supreme Court Rules and R.S.Mo., Section 546.270. After an objection by defense counsel, the trial judge instructed the jury to disregard that remark. By considering this statement along with the later statement concerning the petitioner's failure to respond during trial, it becomes quite apparent that the fundamental objective of the prosecutor was to bring to the attention of the jury, either directly or indirectly, that the petitioner had failed to take the stand in his own defense in this particular case.

The State attempts to explain the comment made by the prosecuting attorney during closing argument concerning the failure of the defendant to respond as a reference to the petitioner's breaking down and weeping during defense counsel's closing argument. There was, however, a substantial amount of time between the weeping of the petitioner and the statement made by the prosecutor. The weeping of petitioner occurred some thirteen (13) transcript pages before the comment. *State* v. *Frankoviglia*, 514 S.W.2d 536, 540 (Mo., 1974). Moreover, the trial judge himself thought the prosecuting attorney was "dangerously" close to making the comment (Tr. p. 622). Due to the significant time span involved, it would be extremely difficult for the jury to draw only the inference being argued by the State concerning the comment. If in fact the prosecuting attorney was making a reference to the weeping, why didn't he choose the word "weep" or "cry" instead of respond. (Earlier the Prosecuting Attorney did make a direct comment on this. "Sympathy, weeping, children" (Tr. p. 619).) Based on this information, the jury might reasonably have inferred from

these statements that the petitioner's failure to testify was evidence of his guilt. Such an inference is patently contrary to the mandate of *Griffin, supra.*

The record taken as a whole, consequently, demonstrates that the State has not established beyond a reasonable doubt that the constitutional error present in this case was harmless. To the contrary, the evidence demonstrates that the comments by the prosecution on the petitioner's silence were plain, fundamental error. *Deats* v. *Rodriguez,* 477 F.2d 1023 (10th Cir., 1973). The questioned arguments were obviously calculated to move the jury toward conviction. "Indeed, the very persistence of the government in making these remarks is proof that it attached much importance to them." *Rodriguez-Sandoval* v. *United States,* 409 F.2d 529, 531 (1st Cir., 1969).

Applying the foregoing to the facts at bar, surely the comment here was a "direct, non-ambiguous and unequivocal prosecutorial comment on the failure of a criminal defendant to become a witness," and such comment cannot be considered harmless beyond a reasonable doubt. Surely, this is language that "singles out" the defendant as the absent witness and as such is constitutionally impermissible. Because of the comment, defendant was denied a fair trial.

In conclusion, the prosecutor's attempt to have the jury equate the petitioner's guilt with his silence at trial was improper. Such a comment, even by implication, is violative of *Griffin, supra,* and constitutes reversible error based on an obvious attempt to create an impermissible adverse inference in the minds of the jurors regarding petitioner's exercise of his Fifth Amendment rights at trial.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1373

John Frankoviglia,
Appellant,

v.

George Camp and Donald W. Wyrick,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: November 14, 1975
Filed: December 3, 1975

Before HEANEY, ROSS and WEBSTER, Circuit Judges.

ORDER OF AFFIRMANCE

In this habeas corpus proceeding, John Frankoviglia appeals from the judgment of the District Court for the Eastern District of Missouri, finding that the remarks of the prosecutor made in the closing arguments to the jury in his state criminal trial were not improper comments on his failure to testify and were, in any event, not prejudicial. Upon a careful consideration of the record and of the briefs and arguments of the parties, we adopt the opinion of the

District Court published at *Frankoviglia v. Camp*, 394 F. Supp. 1293 (E.D. Mo. 1975).

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 75-256C (2)

JOHN FRANKOVIGLIA,
Petitioner,

vs.

GEORGE CAMP, et al.,
Respondents.

MEMORANDUM OPINION

(Filed April 24, 1975)

This petition for a writ of habeas corpus was transferred to this Court from the Western District of Missouri. The sole question presented is one of law, so that no evidentiary hearing is required.

Petitioner was convicted in the Circuit Court of St. Louis County of murder in the first degree and was sentenced to life imprisonment. The offense was allegedly committed in Jackson County, a change of venue having been taken to St. Louis County. The State's evidence was to the effect that petitioner had contracted with the actual killer for the murder of a Sol Landie, a key witness in a federal prosecution.

The petitioner did not take the stand in his own defense. He grounds his petition on the allegation that the prosecutor prejudicially commented on his failure to testify, thereby violating his Fifth Amendment privilege against self-incrimination. On his direct appeal, the Missouri Supreme Court ruled this contention adversely to petitioner (*State* v. *Frankoviglia*, Mo., 514 S.W.2d 536), so that his available state remedies have been exhausted.

We start from the premise that, as held in *Griffin* v. *California*, 380 U.S. 609, comment by a prosecutor in a state criminal trial upon a defendant's failure to testify violates the Self-incrimination Clause of the Fifth Amendment as made applicable to the states by the Fourteenth Amendment to the Constitution of the United States. We also bear in mind that even such a constitutional error does not mandate reversal of the conviction if the Court is satisfied that it was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18.

The comment in question occurred about midway in the State's closing argument after defense counsel had presented his argument on behalf of petitioner. We quote the pertinent portion of the prosecutor's argument:

"Mr. Hill [counsel for petitioner] talks about nitpicking. I don't think that he is nitpicking, I think that he is desperate. I think that he is unusually vicious to the attorneys. I cannot remember his being that vicious to me or Mr. Shockey or Mr. Freeman [Assistant prosecuting attorneys]. I think that he is desperate. I think Mr. Frankoviglia is just beginning to realize what he is facing. I notice he didn't respond to testimony of the murder of Mr. Landie."

The prosecutor's remarks did not occur in a vacuum. To fully understand their purport, it is necessary to place

them in proper context, so that we may apply "the appropriate standard" for determining whether the comments were improper:

"The facts and circumstances of each case must be carefully analyzed to determine 'whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' ", quoted in *United States* v. *Biondo*, 8 Cir., 483 F.2d 635, 644.

What then were the facts and circumstances? The State was seeking the death penalty. During his counsel's argument to the jury, petitioner broke down, thereby interrupting his counsel's argument, and (in the words of the trial judge) petitioner's "audible and visible weeping spell" was such that "the Court was required to call a recess to allow defendant to regain his composure" before his counsel could continue.

We believe it significant that the prosecutor's justification for the argument was not an afterthought but was made immediately upon objection having been made. The trial court, who was in the best position to know, stated, in ruling the motion for a new trial, "The prosecutor's comment was made only with reference to the weeping incident and not to defendant's failure to testify."

In our judgment, the language complained of was not "manifestly intended" by the prosecutor nor was it of such character that the jury would "naturally and necessarily" take it as a comment upon petitioner's failure to testify. What the prosecutor was doing was to contrast petitioner's lack of emotion (of which the jury would be aware) while the witnesses were testifying as to the gruesome details of the Landie murder itself, with his crying spell while his lawyer was arguing for petitioner's own

life. In the sentence immediately preceding the one at issue, the prosecutor had stated, "I think Mr. Frankoviglia is *just beginning to realize* what he is facing," a comment which illuminates the words which follow, "I note". Those words clearly referred to the prosecutor's visual observation of petitioner. And the word "response" was undoubtedly used in the context of defendant's composure (and failure to react) while the evidence relating to the details of the killing was being presented. The prosecutor made no reference at all to a failure to "respond" to the testimony of the *contract* for the murder, which was petitioner's only contact with the offense, since he had not been at the scene of the crime itself. Surely petitioner could not have it both ways, that is, reap the benefit of his emotional crying spell in the jury's presence upon realizing that his own life was in peril, without having the jury being reminded of his prior impassivity with respect to the taking of Landie's life. Cf. *Hayes* v. *United States*, 9 Cir., 368 F.2d 814, in which the prosecutor called attention to the attitude of the defendant during the testimony of a prosecution witness. It is also to be borne in mind that because of the objection made by petitioner's counsel, the prosecutor was not permitted to finish his train of thought and thus conclusively demonstrate that the purpose of his argument was in fact what he stated it to be.

Petitioner argues that in any event the prosecutor's comment is ambiguous in that it is susceptible of being interpreted as a reflection on his failure to testify. We do not believe that in the context, the one-sentence statement is in fact ambiguous. In its decision adverse to petitioner, the Supreme Court of Missouri held, not that remark was in fact ambiguous but that "*if*" it might be construed as urged by petitioner, it is also subject to the contrary interpretation which was given to it by the trial court

who had observed petitioner during the course of the trial. As we read the cases, the test to be applied is not whether there is a *possible* ambiguity, but whether the jury would "naturally and necessarily" construe the statement as a comment upon the defendant's failure to *testify*. In the circumstances of this case, we do not believe that a reasonably intelligent juror would "naturally and necessarily" interpret the sentence in question as a comment upon petitioner's failure to take the stand.

Even if it be assumed that the one-sentence remark of the prosecutor was ambiguous to the extent that it could conceivably be construed as petitioner contends, it was "harmless beyond a reasonable doubt" under the rule of *Chapman* v. *California*, 386 U.S. 18. On this issue the single sentence here complained of may be contrasted with the "extensive" and "machine-gun repetition" type of argument set forth in *Chapman*, as well as in *Griffin*, supra, and *Anderson* v. *Nelson*, 390 U.S. 523.

In each of those cases, the prosecutor's comments were as explicit as the English language will permit. Thus, in *Anderson*, the prosecutor in an argument covering two printed pages of the Supreme Court Report hammered away at the theme that inferences favorable to the defendant should be overlooked because he did not get up on the stand and lie and tell the jury "a lot of hogwash." In *Chapman*, the prosecutor's 19 page argument covering every facet of the defendants' failure to testify "*continuously and repeatedly* impressed the jury * * * that by their silence [defendants] had served as irrefutable witnesses against themselves." And in *Griffin*, after expressly adverting to matters which "[the defendant] had not seen fit to take the stand to deny or explain," the prosecutor concluded by stating, "Essie Mae is dead, she can't tell you her side of the story. The defendant won't."

Having concluded from our review of the entire trial record that the challenged one-sentence observation of the prosecutor (which at most was ambiguous) was neither manifestly intended to be nor of such character that the jury would naturally and necessarily consider it to be a comment on petitioner's failure to testify, it follows that petitioner is not entitled to a writ of habeas corpus.

Dated this 24th day of April, 1975.

/s/ John K. Regan
United States District Judge

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE

No. 57,944

STATE OF MISSOURI,
Respondent,

vs.

JOHN FRANKOVIGLIA, a/k/a JOHN FRANKS,
Appellant.

Appeal from the Circuit Court of St. Louis County
The Honorable James Ruddy, Judge

(Filed September 9, 1974)

John Frankoviglia, a/k/a John Franks, was convicted by a jury of murder, first degree. His punishment was assessed at life imprisonment, and sentence and judgment were rendered accordingly. (Appeal taken May 25, 1972; jurisdiction retained pursuant to order April 9, 1973.)

Appellant charges that the court erred (III) in refusing to direct a verdict of acquittal "because there was no

credible evidence beyond a reasonable doubt to convict defendant."

In introduction to this contention, appellant concedes from the testimony of Ann Landie, wife of Sol Landie, deceased, Dr. David Zoller, pathologist, Detective George Henthorn, who recovered the death bullet from the pathologist, and Sergeant Robert Hardesty, who identified the murder weapon and the murder scene, that "in the early morning hours of Sunday, November 22, 1970, in a southern residential district of Kansas City [Jackson County], Missouri, a junkyard dealer by the name of Sol Landie was murdered in his bed as his wife lay beside him. Landie's wife was raped and his home ransacked."

Also, appellant recognizes that the State's evidence was designed to show that defendant had contracted for the murder of Sol Landie, who was a witness in a federal prosecution.

Edward Ronald ("Ronnie") Williams, age 25, lived at 6820 Paseo, Kansas City, Missouri, with his sister, father, and cousin, Marquise ("Stuff") Williams, whom he considered as a brother. He had pleaded guilty to a charge of murder in connection with the killing of Sol Landie and had been sentenced to life imprisonment.

Ronnie had a telephone conversation with Thomas Jefferson ("Tommy") Lee November 9, 1970, with respect to making some money, and they agreed to talk in person later in the week. On November 13, 1970, Ronnie, in Earl Howard's automobile with Earl, Howard Hill, and Edward ("Skippy") Medina, met Tommy in his automobile. Ronnie went to Tommy's car and Tommy told him he wanted Sol Landie "bumped off."

On November 17, 1970, Ronnie went to Tommy's house and he and Tommy drove in Tommy's Cadillac, a

blue and white Coupe DeVille, to Landie's place of business in Kansas City, Kansas, where Tommy identified Sol Landie to Ronnie as the man to be killed because he was behind some gambling indictments or was a witness.

On November 21, 1970, Ronnie received a call from John ("Johnny Franks") Frankoviglia and was told to come by his place of business, Refinoil, 10th and Hardesty, Kansas City, Missouri. He drove there with Marquise Williams and Gary Johnson. He went in the station and Franks asked him why he had not yet killed Landie and gave him some marijuana to build up his nerve. From there the three picked up Linda Holoman and went to a party where a crap game was in progress and where they drank beer, cognac, and wine, and smoked marijuana until nearly 1:30 a.m., November 22, 1970. They left that party and went to Ronnie's home and continued the party. Ronnie received a call from defendant who told him that if the job was not performed he would be "bumped off" or a bomb put under his house. Ronnie then stole his father's gun, a 41-caliber hand gun, and he, Gary Johnson, Marquise Williams, and Earl Howard went to the Landie home at the address given them by defendant. They entered by the rear door, defacing it to appear as though entry had been forced. Once in the home, they ransacked it and took money and jewelry to make it appear as though a robbery had taken place. Marquise Williams was the "trigger man" who shot Mr. Landie.

On November 23, 1970, Ronnie went to defendant's place of business and was told by defendant that Tommy Lee had the money for him. Tommy gave Ronnie $2,000 out of which Ronnie gave $300 to Marquis Williams, $300 to Gary Johnson, and $1,000 to Earl Howard, principally for disposing of some of the property taken from the Landie home.

Ronnie, as the State's chief witness, was corroborated variously by Richard Landie, Glenda Mae Williams, Linda Holoman, Marquise Williams, Edward Medina, Detective Clarence Luther, Detective Bert Cool, and Gary Johnson.

William Green, a fingerprint technician, found fingerprints of Gary Johnson at the scene.

Calvin Hamilton, former First Assistant United States Attorney in Kansas City, stated that Sol Landie had been a witness before a federal grand jury in August, 1970, and that an indictment was returned October 2, 1970, to which Mr. Landie, had he lived, would have been a key government witness.

The defense consisted of testimony from James McMullin, a law partner of defense counsel, calculated to render ineffective the testimony of Gary Johnson, Ronnie and Marquise Williams; testimony of Ralph Barreco, brother-in-law of defendant, to show that defendant did not go to his place of business on Saturdays and particularly on Saturday, November 21, 1970; and testimony of Nicholas and Antelina Frankoviglia, children of defendant, to show that he was home with them Saturday, November 21, 1970, and that after dinner, the family retired shortly after 10:00 p.m. Defendant and his wife did not testify.

The foregoing demonstrates a submissible case against defendant for murder, first degree. It is true, as argued by appellant, that the State's case rested primarily on the testimony of three convicted felons, Ronnie and Marquise Williams and Gary Johnson. Nevertheless, their records did not render them incompetent to testify, Section 491.050, RSMo 1969; and discrepancies and contradictions, if any, in all the evidence, were for the jury to resolve under its duty to judge of the credibility of all witnesses and of the weight and value to be given to their testimony.

Appellant charges the court erred (II) in failing to grant a mistrial and in failing to grant a new trial "because in closing argument, the Prosecuting Attorney made direct reference to the failure of defendant's wife to take the stand, all in violation of Rule 26.08 * * * and of Section 546.270 * * *." See also, e.g., State v. Watson, 1 S.W. 2d 837 (Mo. 1927); State v. Shouse, 188 Mo. 473, 87 S.W. 480 (1905); State v. Allen, 235 S.W. 2d 294 (Mo. 1950).

Rule 26.08, V.A.M.R., and Section 546.270, RSMo 1969, provide that if the accused shall not avail himself of his right to testify on trial, or of the testimony of his wife, it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by any attorney in the case, nor be considered by the court or jury in trying the case.

This incident occurred in the State's closing argument: After introductory remarks, the assistant prosecution attorney reviewed the evidence which he felt proved the State's theory of the case, i.e., that defendant, through Tommy Lee, procured Ronnie Williams to kill Sol Landie because he was a government witness on indictments of interest to defendant, and that some of the arrangements and questions occurred during face-to-face conversations and telephone calls on the Saturday and early Sunday morning preceding the murder. He proceeded:

"[MR. FREEMAN for plaintiff]: Now, I will refer just briefly for a moment to the defense in this case. You heard from two beautiful children in their late teens, testified that they spent every Saturday that fall home with their daddy, and, again, although one of them is a college student, stayed home all day every Saturday. Johnnie never left the house, never went by his business on Saturday, although it is just a mile away. And they are always in bed by ten or ten-thirty on Saturday night. It is strange

that you did not hear from Mrs. Frankoviglia. MR. HILL [for defendant]: If it please the court, I have an objection. THE COURT: Step up.

"(Thereupon the following proceeding was had out of the hearing of the jury.)

"MR. HILL: Mr. Freeman has just referred to the failure of the spouse of the defendant to not [sic] testify. The protection which is given to the defendant also protects the spouse. This amounts to a comment by the Prosecutor on the failure of the defendant's wife to testify. At this time we move that the jury be instructed to disregard that comment, and we further move for a mistrial. * * * THE COURT: I am going to deny your request for a mistrial, but I am going to caution you, Mr. Freeman, not to approach on that subject again. I will instruct the jury to disregard that remark. MR. HILL: There is one thing further. Mr. Freeman and the jury knows she has been seated in the courtroom throughout the entire trial and for that reason could not be put on as a witness. THE COURT: I don't know that the jury knows who she is. * * *

"(The above concluded the proceeding had out of the hearing of the jury.)

"THE COURT: Gentlemen, you will disregard the last statement made by counsel, and you will not take that into consideration in your deliberation in any way, shape or form."

The assistant prosecuting attorney then proceeded to review the defense case and to conclude with a request for conviction.

Control of arguments of counsel and determination of the existence of prejudice as a result of an argument are matters within the discretion of the trial judge, and the

judge's rulings will not be disturbed on review unless such discretion has been clearly abused.

With respect to this incident, the trial court, upon consideration of defendant's motion for new trial, found: "Even though the comment of the Assistant Prosecuting Attorney * * * in referring to the failure of Defendant's spouse to testify was improper, the Court does not feel that said impropriety was prejudicial under the circumstances. The Court immediately instructed the jury to disregard said remark and not to take it into consideration in their deliberations. The Court feels that if there was any error in said comment, said error was corrected by the admonition to the jury, immediately following the comment."

The quoted record shows also that the initial request of defense counsel was for an instruction to the jury to disregard the comment and "further" for the mistrial; and that the court's admonition to the jury was in response to counsel's initial request and in stronger language and broader scope than the request.

Appellant asserts that the court's instruction did not cure the error, and that the comment prejudiced defendant in the eyes of the jury and denied him a fair trial. He does not provide any demonstration in support.

In the particular situation presented, the court's instruction to disregard appears sufficient to have cured any error flowing from the comment in question. State v. Sechrest, 485 S.W. 2d 96, 99[4] (Mo. 1972); 9A Mo.Dig. 313, Criminal Law, Key No. 730(10).

Appellant charges the court erred (I) in overruling defendant's objection during the State's closing argument and in overruling his motion for new trial for the reason that a comment of the prosecuting attorney constituted a violation of defendant's privilege against self-incrimination,

of Section 546.270, and of Rule 26.08, supra, "said statement being prejudicial to this defendant, thus denying him a fair trial because the jury's attention was improperly called to the defendant's failure to testify." See also, e.g., State v. Ferrell, 233 Mo. 452, 136 S.W. 709 (1911); State v. Swisher, 186 Mo. 1, 84 S.W. 911 (1905); State v. Dupepe, 241 S.W. 2d 4 (Mo. 1951); State v. Robinson, 184 S.W. 2d 1017 (Mo. 1945); State v. Shuls, 329 Mo. 245, 44 S.W. 2d 94 (1931); State v. Snyder, 182 Mo. 462, 82 S.W. 12 (1904); State v. Drummins, 274 Mo. 632, 204 S.W. 271 (1918); State v. Anderson, 240 S.W. 846 (Mo. App. 1922); State v. Dodo, 253 S.W. 75 (Mo. App. 1923); State v. Volz, 269 Mo. 194, 190 S.W. 307 (1916); State v. Lindner, 282 S.W. 2d 547 (Mo. 1955); State v. Tibbetts, 299 A. 2d 883 (Me. 1973); Griffin v. California, 380 U.S. 609 (1965); Stewart v. United States, 366 U.S. 1 (1961).

This incident occurred in this context: Defense counsel's argument had proceeded for eleven transcript pages when counsel was interrupted.

"MR. FREEMAN: Excuse me, just a moment, Mr. Hill. THE COURT: All right, step up, gentlemen.

"(Thereupon, the following discussion was had out of the hearing of the jury:)

"MR. FREEMAN: I don't know if this guy is sick or what, but this guy is really coming apart. I object to him doing this in the presence of the jury. MR. HILL: Who? MR. FREEMAN: Your client. MR. HILL: Can we take a brief recess? THE COURT: All right, we will take a brief recess.

"(The above concluded the discussion had out of the hearing of the jury.)

"THE COURT: Gentlemen, we are going to take a brief recess at this time.

"(Thereupon, the Court having duly admonished the jury, a short recess was had.)

"THE COURT: You may proceed."

After the recess defense counsel continued for thirteen transcript pages and concluded.

The prosecuting attorney made the State's closing argument, much of which was devoted to answering defense counsel's criticism of the State's case and its attorneys. The particular incident occurred midway in the argument:

Mr. Hill talks about nitpicking. I don't think that he is nitpicking. I think that he is desperate. I think that he is unusually vicious to the attorneys. I cannot remember his being that vicious to me or Mr. Shockey or Mr. Freeman. I think that he is desperate. I think Mr. Frankoviglia is just beginning to realize what he is facing. I notice he didn't respond to testimony of the murder of Mr. Landie.

"(Thereupon the following proceeding was had out of the hearing of the jury:).

"MR. HILL: We object to the Prosecutor's statement as being a comment on the failure of the defendant to take the stand. MR. TEASDALE: I am obviously referring to his breaking down and weeping during the final argument. THE COURT: I overrule the objection, but I caution you to stay clear of that subject matter. You are getting dangerously close to it.

"(The above concluded the proceedings had out of the hearing of the jury.)"

The prosecuting attorney proceeded with a brief review of the evidence and concluded with a request for conviction and the death penalty.

With respect to this incident, the trial court, upon consideration of the motion for new trial, found: "Such allegation is without merit. It is very clear to the Court that said reference was made only in response to the Defendant's audible and visible weeping spell during the Defendant's attorney's closing argument. Such a display was such that the Court was required to call a recess to allow Defendant to regain his composure. Any reference made by Mr. Teasdale was made only with reference to this incident and not to Defendant's failure to testify."

Appellant argues that under his authorities, the comment in question was a proscribed comment on defendant's failure to testify in that it "singles out" the defendant as the absent witness.

The key words of the rule and statute are "accused" and "testify," and the test is whether the jury's attention was called to the accused's failure to testify. State v. Hayzlett, 265 S.W. 2d 321 (Mo. 1954); 68 A.L.R., l.c. 1108, 1121. The cases consistently require for reversal of a conviction that there be a direct, nonambiguous and unequivocal prosecutorial comment on the failure of the defendant to become a witness. See, e.g., State v. Tibbetts, State v. Dupepe, State v. Shuls, supra.

Defendant's difficulty is that the comment in question does not meet the foregoing tests as a subject for reversal of a conviction. At most, the comment is ambiguous in that if it may be construed as urged by appellant, it is also subject to the construction and context given it by the trial judge. The word "respond" in its context was as much a reminder to the jury that defendant had not audibly wept and sobbed during the State's case as he did during his counsel's argument, as it was a comment on defendant's failure to reply or testify in contradiction of the State's case. And, coupled with use of "notice" in the present

context, it is most likely that a visual observation such as that found by the trial court had been made.

Accordingly, the court's ruling on the objection and the cautionary instruction given counsel were not an abuse of the trial court's discretion in control of the argument.

Judgment affirmed.

Andrew Jackson Higgins, Commissioner

Welborn, C., concurs.

And thereafter, to-wit, on the 4th day of May, 1972, defendant's Amended Motion for New Trial was heard and argued and was taken under advisement by the Court.

DEFENDANT'S FIRST AMENDED MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL AND DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL OVERRULED. [3]

And thereafter, to-wit, on the 18th day of May, 1972 the Court having duly considered the Defendant's Motions for Judgment of Acquittal or in the Alternative for a New Trial, and they now fully advised in the premises, overruled said Motions. Said ruling was in the words and figures as follows, to-wit:

(Caption omitted.)

"Defendant's First Amended Motion for Judgment of Acquittal or in the Alternative for a New Trial and Defendant's Motion for Judgment of Acquittal or in the Alternative for a New Trial heretofore argued and sub-

mitted, all memorandums of law having been submitted, said motions are hereby over-ruled on all points.

"The Court duly considered all allegations of error, more particularly those with reference to the final argument of the Prosecuting Attorneys and finds that said allegations are without merit. Even though the comment of the Assistant Prosecuting Attorney, Mr. Freeman, in referring to the failure of Defendant's spouse to testify was improper, the Court does not feel that said impropriety was prejudicial under the circumstances. The Court immediately instructed the jury to disregard said remark and not to take it into consideration in their deliberations.

"The Court feels that if there was any error in said comment, said error was corrected by the admonition to the jury, immediately following the comment.

"The Defendant further has complained of the statement of the Prosecuting Attorney, Mr. Teasdale, in the closing one-half of final argument making reference to the Defendant's failure to testify. Such allegation is without merit. It was very clear to the Court that said reference was made only in response to the Defendant's audible and visible weeping spell during the Defendant's attorney's closing argument. Such a display was such that the Court was required to call a recess to allow Defendant to regain his composure. Any reference made by Mr. Teasdale was made only with reference to this incident and not to Defendant's failure to testify. Formal sentencing is hereby set for Thursday, May 25, 1972, at 9:30 a.m.

"/s/ James Ruddy,

James Ruddy,

Judge, Division #14."

(Filed May 18, 1972.)